

# Book Review: Arbitration in China: A Legal and Cultural Analysis<sup>1</sup>

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## I. INTRODUCTION

In *Arbitration in China: A Legal and Cultural Analysis*, author Fan Kun seeks “to study arbitration in China in the context of globalisation and to compare Chinese practice with transnational standards.”<sup>2</sup>

Dr. Fan argues that in recent years, arbitration is becoming the “preferred method” to settle international commercial disputes, because of arbitration’s perceived benefits of economy in time and expenses, confidentiality, enforceability, neutrality, and liberty from national laws’ restraints. Dr. Fan seeks to “study arbitration in China in the context of globalization and to compare Chinese practice with transnational standards.”<sup>3</sup> These standards primarily refer to arbitration laws of the “New York Convention”<sup>4</sup> and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration<sup>5</sup> of 1985, with Amendments, as adopted in 2006. Dr. Fan also compares arbitration in China with French law, Swiss law, English law, as well as insights she gained while working as a Deputy Counsel at the International Chamber of Commerce’s International Court of Arbitration (ICC Court).

However, this book portrays “transnational arbitration” not simply as sets of laws or standards but as an ever-developing organism “away from the grip of states,” reflecting the “needs and expectations of the ‘consumers’ of international arbitration.”<sup>6</sup> A central point of this book is that “the trend of harmonisation in the law and practice of [international] arbitration will not lead to the ‘universality of arbitration’, erasing all the differences. Rather, the development of transnational arbitration will continue as a process of

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<sup>1</sup> KUN FAN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* (Wenhua Shan et al. eds., 2013).

<sup>2</sup> FAN, *supra* note 1. Unless otherwise indicated, ‘China’ in this book refers to the PRC and does not include Hong Kong, Taiwan, or Macau.

<sup>3</sup> *Id.* at 6.

<sup>4</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

<sup>5</sup> UNCITRAL Arbitration Rules, UN Doc. A/RES/31/98; 15 ILM 701 (1976).

<sup>6</sup> *Id.* at 3–4.

‘globalisation’, which reflects combined impacts of globalisation of law and local culture and traditions.”<sup>7</sup>

## II. CHAPTER SUMMARIES

As part of its ongoing efforts to develop its economy and attract foreign investment, particularly since accession to the World Trade Organization (WTO), China has been adopting international arbitration practices. In her book, Dr. Fan is especially interested in identifying what the special characteristics of China’s arbitration laws and practices are compared with transnational standards and these are discussed in Chapters Two, Three, and Four. Chapter One presents an overview of the Chinese judicial system, its legal framework, the historical development of arbitration legislation in China, and the types of arbitration in China (domestic, foreign-related, and foreign). Chapter Two compares Chinese law and practice with transnational standards in terms of the arbitration agreement, and Chapter Three compares Chinese practices and transnational standards regarding the jurisdiction and constitution of arbitral tribunals. Chapter Four covers the recognition and enforcement of arbitral award—including a statistical assessment of the enforcement record and case studies on the Chinese side.

Chapter Five turns to the practices of arbitration institutions in China. Since today there are over two hundred of these, she focuses on comparing the practices of the China International Economic and Trade Commission (CIETAC), said to have the largest caseload in the world, with those of the ICC Court.<sup>8</sup> She briefly describes domestic arbitration institutions before and after their reform in 1994.<sup>9</sup> The degree of official interference in financial support of local arbitration institutions at present depends on the locale.<sup>10</sup>

In Chapter Six, Dr. Fan discusses the pros and cons of “arb-med” (when the same person(s) act(s) as mediator and arbitrator the same proceeding) and compares what arbitration and mediation mean in both the Chinese and “Western” contexts.<sup>11</sup> She also explains the historical and cultural reasons why in China “the distinction between the function of the arbitrator and that of the mediator is blurred.”<sup>12</sup> At present, she writes, although the idea and practice of arb-med is accepted in some legal spheres in “the West,” there is

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<sup>7</sup> *Id.* at 244.

<sup>8</sup> *Id.* at 117–18.

<sup>9</sup> *Id.* at 122.

<sup>10</sup> FAN, *supra* note 1, at 134–36.

<sup>11</sup> *Id.* at 137–38.

<sup>12</sup> *Id.* at 137.

no transnational consensus yet, and she suggests that Chinese practice might serve as a stimulus in this direction.<sup>13</sup>

In Chapter Seven, Dr. Fan argues that in the context of the economic reform period and especially since the changes in the arbitration laws and practices since the 1990s, there has been much progress in China towards reaching transnational standards.<sup>14</sup> Yet at the same time, she points out five current “Chinese characteristics” of arbitration at present: certain deficiencies in arbitration law, inconsistencies in the laws’ implementation, ongoing government intervention, a weak concept of party autonomy, and the ongoing vital importance of mediation in arbitration.<sup>15</sup>

In Chapter Eight, Dr. Fan takes on the onerous task of describing the main aspects of “China’s legal culture,” and gives an overview of both Chinese legal history and legal theory, including commercial history and dispute resolution in Imperial China, because it is another central point in her book that China’s traditional legal culture has had enduring influence upon contemporary arbitration practice in China.<sup>16</sup> She argues, for example, that philosophical traditions promoting social harmony, and a polity ruled more by *li* (moralistic rules within each social group) than by *fa* (law in a narrow sense), as well as local magistrates and existing social institutions discouraging litigation, are some reasons why long-standing mediation traditions melded with modern arbitration practices.<sup>17</sup>

About the pages in this chapter on commercial history in China, there are some points where more discussion would be stimulating: for example, how to reconcile her observation regarding the high degree of commercialization in Ming-Qing China with her claim that “self-sufficient natural economy was the main form of production.”<sup>18</sup> The work of G. William Skinner (1964; 1965) has suggested that Ming-Qing China was characterized by interlinked periodic markets within each of eight macro-regions.<sup>19</sup> The ideal of “emphasizing agriculture and repressing commerce” was one normative strain in Confucian discourse, but there were others such as “pacify the

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<sup>13</sup> *Id.* at 169.

<sup>14</sup> *Id.* at 170–71.

<sup>15</sup> *Id.* at 171–80.

<sup>16</sup> See FAN, *supra* note 1, 200–02.

<sup>17</sup> *Id.* at 194–200.

<sup>18</sup> *Id.* at 201–02.

<sup>19</sup> See G. William Skinner, *Marketing and Social Structure in Rural China*, 24 J. ASIAN STUDIES 1, 3–43, 195–228, 363–99 (1964–1965). On the macroregional thesis, see G. WILLIAM SKINNER, *Regional Urbanization in Nineteenth-Century China and Cities and the Hierarchy of Local Systems*, in *THE CITY IN LATE IMPERIAL CHINA* 211–36, 281–301 (ed. G. William Skinner, 1977).

people and facilitate commerce.”<sup>20</sup> Furthermore, the ideal of a quadripartite social order with merchants listed at bottom was more of an ideal than a description of actuality.<sup>21</sup> Lloyd E. Eastman holds that the central governments of late Imperial China were ambivalent to merchants and commerce—at times supportive; at times extractive, due to great benefits of tax revenues; or at times indifferent.<sup>22</sup> As far as how traditional Chinese merchant guilds carried out dispute resolution without a system of commercial law comparable to Europe’s, Dr. Fan explains the distinctive Chinese way of arbitration and mediation on pages 203–207.<sup>23</sup>

In Chapter Nine, the effects of modernization on China’s legal system and the development of commercial law in the reform era since 1978, as China moved from a state-planned economy towards a market-oriented economy, are the subjects of discussion.<sup>24</sup> Since 1978, a plethora of civil and criminal laws have been enacted, but China still needs an integrated legal system and better mechanisms of enforcement.<sup>25</sup> Dr. Fan points out that on the one hand, the central government has sought to devolve power to the provincial and local levels, but on the other hand, all three levels vie for authority and resources.<sup>26</sup> Foreign investors may be caught in the middle, and weak coordination of policies, laws, and regulation remains a central problem for foreign investors in their investment strategy planning.<sup>27</sup>

### III. CONCLUSION

In this study of the Chinese case, Dr. Fan illustrates the process of glocalisation, how “global norms are localised when domestic actors translate and conceptualise the borrowed concepts by referring to local

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<sup>20</sup> FAN, *supra* note 1, at 202; LLOYD E. EASTMAN, FAMILY, FIELDS, AND ANCESTORS: CONSTANCY AND CHANGE IN CHINA’S SOCIAL AND ECONOMIC HISTORY, 1550-1949, 102 (1988).

<sup>21</sup> There is a similar normative example from Medieval Europe of the “three estates” described by eleventh-century clerics: those who pray, those who fight, those who work (peasants), the ideal social order promulgated by anxious ruling elites at the same time as expanding commercial markets and development of the *lex mercatoria* by merchants themselves. See MEDIEVAL EUROPE: A SHORT HISTORY 157–58 (C. Warren Hollister & Judith M. Bennett eds., 9th ed., 2002).

<sup>22</sup> See LLOYD E. EASTMAN, FAMILY, FIELDS, AND ANCESTORS: CONSTANCY AND CHANGE IN CHINA’S SOCIAL AND ECONOMIC HISTORY, 1550-1949, 102, 134 (1988).

<sup>23</sup> See FAN, *supra* note 1, at 203–07.

<sup>24</sup> *Id.* at 214–15.

<sup>25</sup> See *id.* at 218–20.

<sup>26</sup> *Id.* at 225.

<sup>27</sup> *Id.* at 226.

notions.”<sup>28</sup> She concludes her book by discussing how China is adapting, through legislative and institutional reforms, to transnational standards, and also, as part of a two-way process, how China’s legal culture could shape the evolution of transnational arbitration.<sup>29</sup> China’s tradition of mediation with a “consensual spirit in the pursuit of social harmony which seeks to resolve disputes in amicable ways may be of great value for the rest of the world.”<sup>30</sup>

In addition to the over-arching theme of glocalization, readers will gain a thorough knowledge about the history and development of Chinese’s arbitration and mediation traditions in light of China’s legal culture. Dr. Fan shows aspects of China rarely reported on by the media, due to her study of Chinese cases and her interviews with representatives of institutes and government bodies centrally involved with arbitration, and readers learn about the strengths and weaknesses of the current legal system in China especially regarding arbitration practices. Moreover, this book compares China not only with transnational standards and certain European laws, but also includes some cases from other Asian countries. Dr. Fan presents an optimistic outlook as she portrays “transnational arbitration” as an ever-developing organism “away from the grip of states.”<sup>31</sup> “The common intention of businessmen may ultimately drive the process toward the convergence and harmonisation of an international commercial arbitration culture. We may thus predict the future of international arbitration as a global convergence.”<sup>32</sup>

Although not everyone may share this optimism about the limits of “the grip of states,” it is a welcome viewpoint to consider in the study and analysis of China and globalization today.

About the author: *Dr. Kun Fan, Assistant Professor at the Faculty of Law, Chinese University of Hong Kong. Arbitration in China: A Legal and Cultural Analysis is based on her doctoral thesis done at the University of Geneva, named “Best Thesis in International Studies” by the Swiss Network for International Studies. Dr. Fan’s academic work is deeply informed by her international professional expertise. She is a member of the New York Bar, has served as a Deputy Counsel of the ICC International Court of Arbitration, and at present practices as a Senior Consultant for Arbitration Asia, and is also an Accredited Mediator and Domain Names Panelist of the Hong Kong International Arbitration Center.*

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<sup>28</sup> FAN, *supra* note 1, at 244.

<sup>29</sup> *Id.* at 243.

<sup>30</sup> *Id.* at 241.

<sup>31</sup> *Id.* at 3–4.

<sup>32</sup> *Id.* at 244.

